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No. 84-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF ILLINOIS and SENTRY FOOD STORES, INC.,
Petitioners,

v.

ASSOCIATED MILK PRODUCERS, INC., ASSOCIATED MILK DEALERS, INC., ASSOCIATED RESERVE STANDBY POOL COOPERATIVE, CENTRAL MILK PRODUCERS COOPERATIVE and CENTRAL MILK SALES AGENCY,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

OPPOSITION BRIEF OF RESPONDENT, ASSOCIATED RESERVE STANDBY POOL COOPERATIVE

WILLIAM A. CAREY*
D. PAUL ALAGIA, JR.
JOHN F. SHERLOCK, III
BARNETT & ALAGIA
1000 Thomas Jefferson St., N.W.
Suite 600
Washington, D.C. 20007
(202) 342-0342

**Counsel of Record* — *Counsel for Respondent*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. May petitioner properly circumvent the decision of this Court in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) (barring indirect purchaser suits) by the simple expedient of alleging that the unjoined and unnamed middlemen from whom the petitioners made their purchases are coconspirators?

2. Was the court of appeals required to make the equitable analysis pertaining to joinder or nonjoinder of the alleged coconspirator middlemen described in Fed.R. Civ.P. 19(b) when:

(a) petitioners never raised the question in either the district court or the court of appeals;

(b) the middlemen were subject to service of process and their joinder as parties would not deprive the district court of jurisdiction over the subject matter of the actions; and

(c) petitioners, knowing the names of the middlemen, failed in their pleadings to state their names and the reasons why they were not joined as parties.

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Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

OPPOSITION BRIEF OF RESPONDENT, ASSOCIATED RESERVE STANDBY POOL COOPERATIVE

Respondent Associated Reserve Standby Pool Cooperative ("ARSPC") respectfully submits this brief in opposition to the Petition For Writ of Certiorari ("Pet.") filed by petitioners State of Illinois ("Illinois") and Sentry Food Stores, Inc. ("Sentry") to review the decision of the United States Court of Appeals for the Eighth Circuit affirming the dismissal of their complaints. ARSPC has no parent company, subsidiaries or affiliates.

COUNTERSTATEMENT OF THE CASE

The petitioners seek to present certiorari-worthy issues by presenting a stilted and radically incomplete statement of the case which fails to disclose that the dismissal of their complaints was the result of their intentional failure to follow the procedures mandated by this Court and the courts of appeal.

A. The Nature Of The Claims

These cases involve raw Grade A milk which is the milk of cows prior to pasteurization. The dairy farmers either themselves or through their agricultural cooperative associations sell this raw milk to Chicago area milk dealers. The dealers are the middlemen who process the raw milk into finished fluid milk products such as whole milk, skim milk, buttermilk and sweet cream. The dealers then sell the finished milk products (either directly or through vendors) to institutional purchasers such as Illinois and retailers such as Sentry. App. 16-18, 25, 29.[1]

Respondent Associated Milk Producers, Inc. ("AMPI") is an agricultural cooperative association whose members are individual dairy farmers. Respondents ARSPC, Central Milk Producers Cooperative and Central Milk Sales Agency are federated cooperatives. Each of their members in turn is a cooperative association of dairy farmers like AMPI. The fifth respondent, Associated Milk Dealers, Inc. ("AMDI"), is a trade association of eight to ten of the some 98 Chicago area milk dealers. App. 16-17.

The essential basis of the petitioners' separate antitrust treble damage complaints, each filed in 1972, is that

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[1] References to "App." are to petitioners' appendix. The one reference to "JA" is to the joint appendix filed in the Eighth Circuit appeals.

the respondents conspired to fix the prices and control the supply of raw Grade A milk sold to dealers in the Chicago area; and that the conspiracy resulted in higher raw milk prices which the dealers then passed on to petitioners in the form of higher prices for milk products. Pet. at 3-4.[2]

ARSPC, as its name implies, operates a reserve standby pool of raw Grade A milk from which it sells requested amounts of reserve milk to its member cooperatives such as AMPI. It sells no milk to dealers. App. 17. The petitioners have never purchased milk in any form from any of the respondents. Pet. at 4. The milk cooperative respondents have never owned, controlled or had supervisory authority over management decisions of AMDI or its member dealers. App. 18.

Indisputably, petitioners are only indirect purchasers of the raw milk product they claim was the subject matter of the alleged conspiracy. App. 13-14. Accordingly, petitioners' own allegations and stipulated admissions bring them squarely within the indirect purchaser rule enunciated by this Court in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 746 (1977) that those who purchase finished products whose price has been enhanced by an alleged raw product conspiracy have monetary causes of action *only* against those from whom they purchased the finished product—in this case unnamed dealers and vendors. They do not have actions against those who sold the raw product to the dealers in the absence of joinder of those dealers.

B. Course Of Proceedings And Dispositions In the District Court

Prior to this Court's decision in *Illinois Brick Co.* respondents moved to dismiss the complaints on the ground

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[2] Sentry purchased its milk products from a master vendor which in turn purchased the milk products from the dealers. App. 29.

that petitioners lacked standing to sue because they purchased no raw milk or milk products from the respondents. Petitioners opposed this motion on the ground that the dealer-middlemen from whom they purchased had conspired with respondents to fix the price of raw milk. The district court on April 1, 1977 denied respondents' motion, not because the dealers were alleged to be coconspirators but because in the district court's view, decisional law allowed indirect purchasers to sue indirect sellers for overcharges passed on by middlemen. Pet. at 4; App. 40-41.

Subsequent to this Court's decision in the *Illinois Brick* case barring such suits by indirect purchasers, respondents moved the district court for summary judgment on the petitioners' treble damage claims.[3] In addition to *Illinois Brick*, the motion papers drew attention to the decision of the Fifth Circuit in *In Re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979), *cert. denied sub nom. Safeway Stores, Inc.* v. *Meat Price Investigators Association*, 449 U.S. 905 (1980) that the *Illinois Brick* rule could not be avoided by the simple expedient of alleging—as here—that the *unjoined* middlemen from whom the plaintiffs made their purchases are coconspirators. Only if plaintiffs join the middlemen as parties, reasoned the Fifth Circuit, can the defendants be protected from the risk of inconsistent adjudications and multiple liability which this Court in *Illinois Brick* found unacceptable.

Petitioners, however, chose not to join the dealer-middlemen as parties defendant. Instead, petitioner Illinois responded to the summary judgment motion by seeking leave to file an amended complaint which the district court believed sought to convert the case from a con-

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[3] Petitioners' injunctive claims were dismissed by stipulation.

spiracy to fix the price of raw milk sold to dealers to a vertical conspiracy to fix the price of milk products sold by dealers to petitioners. Illinois, however, asserted it was not its intent to change the theory of its case. App. 44. The district court denied Illinois leave to file because the amended complaint constituted a "new and different cause of action" reflecting a "dilatory effort on its part to avoid application of the *Illinois Brick* rule to the undisputed material factual circumstances." App. 45-46. Petitioners do not assign error to this ruling.[4]

On January 18, 1982, the district court granted respondents' motion for summary judgment because petitioners were indirect purchasers whose claims were thus barred by the *Illinois Brick* rule. The court rejected petitioners' contention that *Illinois Brick* was inapplicable where the dealer-middlemen from whom they purchased are alleged to be coconspirators. The district court adopted the reasoning of the Fifth Circuit in *In Re Beef Industry Antitrust Litigation*, *supra*, 600 F.2d at 1163 that a " 'co-conspirator' exception to Illinois Brick is not available in a case in which a plaintiff has failed to name the alleged co-conspirator middlemen as parties defendant." App. 23-24. The district court found that the risk of inconsistent adjudications and multiple liability resulting from a failure to join the dealer-middlemen was very real because two dealers who purchased raw milk from the alleged conspiracy had filed similar suits against the respondents. App. 40.

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[4] Petitioners also responded to the summary judgment motion by contending that the *Illinois Brick* rule did not apply because their purchases were made pursuant to the functional equivalent of a cost-plus contact. The district court upon the undisputed facts rejected this contention. App. 23-24, 33-37. Petitioners do not assign error to this ruling.

Petitioners then filed and briefed motions for reconsideration, again choosing not to join the dealer-middlemen. The district court denied the motions because they raised no matters not already considered. JA. 509-12. Nowhere in the extensive pleadings and papers filed in these cases do petitioners state the names of the dealer-middlemen alleged to be coconspirators or the reasons why they have not been joined as parties.

C. Disposition In The Court Of Appeals

The court of appeals affirmed in all respects the district court's grant of summary judgment because "[t]he claims of Sentry and the State present a classic *Illinois Brick* situation." App. 10. In so holding, the court carefully considered and rejected petitioners' contention that the *Illinois Brick* rule was inapplicable because the dealer-middlemen, although not joined as parties, were alleged to be coconspirators. App. 4-9.

The court of appeals first focused on this Court's policy concern expressed in *Illinois Brick* that allowing suits by indirect purchasers would present the danger of multiple liability and complex and uncertain proof in actions based on a passing-on theory. App. 4. The court next reviewed decisions of the Fifth and Ninth circuits which squarely rejected the petitioners' coconspirator theory because the failure to join the middlemen as parties defendant would present the risk of inconsistent adjudications and multiple liability. App. 5-7. It then noted this Court's admonitions that such a risk must be avoided. App. 8. Finally, the court of appeals concluded, as did the district court, that the risk of inconsistent adjudications and multiple liability resulting from the petitioners' failure to join the dealer-middlemen was substantial because two deal-

ers had filed similar treble damage actions against respondents. App. 8-9.[5]

* * *

Although Illinois and Sentry have filed a joint petition for a writ of certiorari, they were not plaintiffs in the same case. Each filed a separate complaint and each proceeded independently in the district court under separate case numbers. Each filed a separate notice of appeal. The appeals proceeded under different appeal numbers (Nos. 82-2162 and 82-2163), with each petitioner filing separate appeal briefs. App. 1. While these briefs raised some of the same issues, they also raised separate issues. See App. at 9-10. The court of appeals consolidated the cases only for purposes of oral argument. The judgment of the court of appeals was entered on March 20, 1984. Illinois' timely petition for rehearing was denied on May 18, 1984. App. 49. However, Sentry filed no rehearing petition nor did it join in Illinois' petition. Pet. at 2. The petition for writ of certiorari was not filed with this Court until August 16, 1984. Accordingly, we suggest that insofar as Sentry is concerned, the petition was not timely filed.[6]

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[5] The court of appeals considered and rejected petitioners' argument that their purchases were pursuant to the functional equivalent of a cost-plus contract (a possible exception to the *Illinois Brick* rule). App. 10. It also rejected petitioner Illinois' argument that it was error for the district court to deny leave to file an amended complaint. App. 9-10. As noted (*supra* at 5), petitioners do not here assign error to these rulings.

[6] We recognize that Rule 20.4 of the Rules of this Court provides that "if a petition for rehearing is timely filed by any party in the case" the time for filing the certiorari petition is extended for all parties. But we do not believe this rule applies because here two separate cases are before this Court. Where cases are consolidated, they maintain their separate identity and the parties retain the same rights they would have had had the cases proceeded separately. 5 Moore's Federal Practice ¶ 42.02[3] at 4228-29 (2d ed. 1982).

REASONS FOR DENYING THE PETITION

The courts below correctly held that the allegation that the dealer-middlemen from whom petitioners purchased their milk products were coconspirators does not exempt the claims from the application of the *Illinois Brick* rule where the dealers are not joined as parties defendant. Fundamentally, petitioners' position invites nullification of the *Illinois Brick* decision which recognized that the legislative desire for the effective enforcement of the antitrust laws is better served by limiting the right of recovery to direct purchasers to the full extent of the overcharge paid by them. 431 U.S. at 746. Allowing avoidance of the *Illinois Brick* rule by simple allegations of middleman conspiracy would restore all the risks of complex and prolific litigation, inconsistent adjudications and multiple liability which this Court has found wholly unacceptable. The presence of these risks—not petitioners' characterizations—are controlling.

The reasoning and decisions of the courts below fully accord with the decisions of this Court and the circuits. Because no conflict exists, and because no important question of federal law has been presented, the petition should be denied.

I. The Decision Of The Eighth Circuit Is In Harmony With The Decisions Of This Court And The Other Circuits

Petitioners concede that the price-fixed product is raw milk and that they never purchased raw milk in any form from respondents. They also assert—without dispute for summary judgment purposes—that the dealer-middlemen paid respondents the alleged raw milk overcharge and that the dealers passsed on this overcharge to petitioners in the form of higher milk product prices. Pet. at 3-4. Substituting raw milk for concrete blocks, Illinois, as an indirect purchaser (and of course Sentry), finds

itself in precisely the same position it was in in *Illinois Brick*.

The considerations which led the Court in *Illinois Brick* to bar recovery to Illinois in its indirect purchaser suit against the concrete block manufacturers are present here with at least equal force. As the courts below found (see *supra* at 5-7), the risk of inconsistent adjudications and multiple liability is very real because some dealer-middlemen have filed suits against respondents similar to those filed by petitioners. In recently reviewing its decisions in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.* 392 U.S. 481 (1968) (barring defensive use of pass-on) and *Illinois Brick* (barring offensive use of pass-on) this Court admonished that "[t]hese cases have stressed the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Associated General Contractors of California, Inc.* v. *California State Council*, ___ U.S. ___, 103 S.Ct. 897, 911-12 (1983).

The Eighth Circuit was, therefore, plainly correct when it concluded that "assuming [petitioners' coconspirator] argument to be a valid exception to *Illinois Brick*, joinder of the retail dealers (the unnamed co-conspirators) is required to prevent a substantial risk of duplicitous liability." App. 8-9. However, petitioners argue that the decision of the Eighth Circuit and the decision of the Fifth Circuit in the *Beef Industry* case, *supra*, 600 F.2d at 1163 conflict with decisions of the Ninth and Seventh circuits. Pet. at 6-7. We demonstrate that this argument is simply wrong.[7]

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[7] Equally misplaced is petitioners' suggestion that *Illinois Brick* allows indirect purchaser suits based on the pass-on theory where, as here, "market forces have been superseded" by the presence of

A. There is no conflict with the Ninth Circuit

The most recent decision of the Ninth Circuit is on all fours with the decisions of the Fifth and Eighth circuits. In *In Re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation*, 691 F.2d 1335 (9th Cir. 1982), *cert. denied sub nom. California* v. *Standard Oil Company of California*, ___ U.S. ___, 104 S.Ct. 972 (1984) (a case in which Illinois participated on the briefs), five states sued the major gasoline refiners for fixing the price of gasoline sold to retail dealers from whom the states made their purchases. The states sued the refiners seeking to recover for alleged "inflated retail gasoline prices". 691 F.2d at 1338. The states, "[i]n an effort to circumvent *Illinois Brick*" suggested they would amend their complaints to allege that the dealers were coconspirators with the refiners. *Id.* at 1341. The trial court responded to this suggestion by entering an order which provided that "[t]he plaintiffs may amend their complaints to allege that defendants conspired with retail dealers of petroleum products only if the conspiring retail dealers are joined as parties defendant." *Id.* at 1338. The states obtained interlocutory review of this order. *Id.*

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coconspiring middlemen. Pet. at 5-6. But this begs the question. The issue is whether an indirect purchaser suit may properly proceed in the absence of the middlemen. Plainly, *Illinois Brick* did not even suggest that market forces are superseded merely by the allegation of conspiracy. Indeed, the Court in *Illinois Brick* limited its market forces discussion to only two narrow situations—neither of which is present here. The first involved the presence of cost-plus contracts. The second involved control of the direct purchaser by its customer. 431 U.S. at 736. In both of these situations, the risk of inconsistent judgments and multiple or fractional awards for the same injury is largely eliminated. *Id.* In the present case, of course, the absence of the middlemen as parties enhances rather than reduces these risks.

The Ninth Circuit affirmed the trial court's order and held that "plaintiffs must join the retail dealers as defendants if they pursue a conspiracy claim" because:

> Absent joinder of retail dealers, serious risks of duplicative recovery and inconsistent adjudications would ensue. *In re Beef Industry Antitrust Litigation, supra*, 600 F.2d at 1148. If plaintiffs recovered damages for a vertical conspiracy between defendants and non-party retail dealers, any of those dealers could prove in a subsequent action that they were not conspirators and, as direct purchasers, were entitled to damages arising out of the same events. *Id* at 1341-42.[8]

Petitioners contend that the decision in *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., Inc*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982) is in conflict with the Eighth and Fifth circuits. Pet. at 6. It is true that the court in *Inglis* stated it is not necessary to name or sue all alleged antitrust conspirators. 668 F.2d at 1053. Such goes without saying. However, *Inglis* was not a pass-on case by an indirect purchaser and thus *Illinois Brick* was not even mentioned. The issue confronting the court was not whether the failure to sue alleged coconspirators presented the risk of complex damage proof and multiple liability. The issue was whether the defendants were misled or unduly prejudiced by plaintiff's failure to identify the precise nature of the conspiracy relied upon and all its participants until just shortly before trial. It was in this context

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[8] Nowhere did the Ninth Circuit hold, as petitioners contend (Pet. at 7), that dismissal for failure to join the middlemen was inappropriate. It held just the opposite. In the present case, Illinois and Sentry were forewarned of the consequences of their failure to join the middlemen; and they had ample opportunity to do so but chose not to for reasons they have yet to disclose. See *supra* at 4-6.

only that the court made the general conspiracy statement which petitioners perceive as a conflict. *Id.* at 1052-53.

Petitioners also perceive a conflict in *Royal Printing Co.* v. *Kimberly-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980). Again, petitioners see a conflict where none exists. Indeed, the case tracks the decisions of the Eighth and Fifth circuits. In *Royal Printing*, plaintiffs were small retail businesses who sued some of the largest manufacturers of paper products for a price fixing conspiracy. Plaintiffs purchased paper products from two middleman sources: independent wholesalers and wholesalers which were subsidiaries or divisions of the defendant manufacturers. The court applied the indirect purchaser rule of *Illinois Brick* to bar recovery for purchases made from the independent wholesalers. 621 F.2d at 324, 327-28. However, the court held that plaintiffs could sue for purchases made from the defendants' subsidiaries and divisions because the defendants' parental control over them would virtually eliminate the risk of multiple liability found objectionable in *Illinois Brick*. *Id.* at 326.[9] In short, the court in *Royal Printing* and the Eighth Circuit applied *Illinois Brick* in precisely the same way. See *supra* at 6-7.

B. There is no conflict with the Seventh Circuit

Petitioners rely for their conflict argument on the Seventh Circuit's decision in *Fontana Aviation, Inc.* v.

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[9] This control factor involves one of the two exceptions to indirect purchaser suits recognized by the Court in *Illinois Brick*. See note 7, *supra*. "[A]n antitrust violator cannot evade liability 'by the simple expedient of inserting a subsidiary between the violator and the first uncontrolled purchaser'." Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 968, n.20 (3rd Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1278 (1984) (quoting In Re Sugar Industry Litigation, 579 F.2d 13, 19 (3rd Cir. 1979)).

Cessna Aircraft Co., 617 F.2d 478 (7th Cir. 1980). Pet. at 7. But the case does not conflict with the Eighth Circuit decision in any respect. In *Fontana*, the plaintiff was engaged in the business of selling and performing custom installations of avionics equipment manufactured by competitors of defendant Cessna. Some of this equipment was installed in Cessna aircraft and some in aircraft manufactured by Cessna's competitors. The equipment and the aircraft were purchased from an independent Cessna distributor. The theory of plaintiff's case against defendant Cessna was that Cessna conspired with the distributor to drive plaintiff out of the avionics equipment business by anticompetitive and unfair practices engaged in by defendant Cessna. 617 F.2d at 479-81. Plaintiff did not seek to recover a price-fixed overcharge passed-on by the distributor. Rather, it sought damages for Cessna's destruction of its business. *Id.* at 480. Thus, there was no risk of complex apportionment of damages or duplicate recovery.

It was in this setting that the *Fontana* court stated it was "not satisfied that the *Illinois Brick* rule directly applies in circumstances where the manufacturer and the intermediary are both alleged to be co-conspirators in a common illegal enterprise resulting in intended injury to buyer." *Id.* at 481. In short, plaintiff sued the principal wrongdoer for direct, not indirect injury. Plainly, therefore, *Illinois Brick*'s policy against indirect purchaser suits had no application.

II. The Petition Presents No Important Issue Of Federal Law

Petitioners' second argument is that the petition should be granted because the decision of the Eighth Circuit conflicts with this Court's decision in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102

(1968). Pet. at 7. The gist of the argument is that the Eighth Circuit failed to apply the equitable criteria contained in Rule 19(b), Fed.R.Civ.P. as required by the *Provident* case; and that had it applied such criteria, it would have determined that the dealer-middlemen were only necessary parties—not indispensable ones. Pet. at 7-8.[10] This argument borders on the frivolous because the application of these equitable criteria occurs *only* when the parties who ought to be joined cannot be. That is not this case.

It is explicit in Rule 19(b) that the equitable criteria set forth therein are to be applied only where the dealer "cannot be made a party." Rule 19(a) provides that whether the dealers can or cannot be made parties depends upon whether they are "subject to service of process" and whether their joinder will "deprive the court of jurisdiction over the subject matter of the action." *Provident*, *supra*, 390 U.S. at 108-09. Petitioners have not asserted that the dealers cannot be made parties. Indeed they can. These cases were filed in the Northern District of Illinois and the dealers are "Chicago milk dealers." Pet. at 3.[11] Indisputably, the dealers are subject to service of process; and venue as to them is proper. See 15 U.S.C. § 15. Being an antitrust case, their joinder could not, of course, deprive the court of jurisdiction over the subject matter. Thus, application of Rule 19(b) to this case is totally inappropriate.

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[10] Petitioners never made this argument below. This alone warrants rejection of the argument. Miree v. DeKalb County, 433 U.S. 25, 33-34 (1977). We assume, for purposes of argument only, that the middlemen were not indispensable parties. However, we observe that under the rule of *Illinois Brick*, petitioners have no cause of action in the dealers' absence. See *supra* at 8-11.

[11] The cases were transferred to the Western District of Missouri pursuant to 28 U.S.C. § 1407.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

WILLIAM A. CAREY*
D. PAUL ALAGIA, JR.
JOHN F. SHERLOCK, III

BARNETT & ALAGIA
1000 Thomas Jefferson St., N.W.
Suite 600
Washington, D.C. 20007
(202) 342-0342
Counsel for Respondent

**Counsel of Record*

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September 1984, three copies of this Brief in Opposition were mailed, postage prepaid, to counsel for each petitioner, as follows:

NEIL F. HARTIGAN, ESQUIRE
ROBERT E. DAVY, ESQUIRE
188 West Randolph Street
Suite 2118
Chicago, Illinois 60601
(Counsel for State of Illinois)

ARAM A. HARTUNIAN, ESQUIRE
JOEL M. HELLMAN
HARTUNIAN, FUTTERMAN & HOWARD, CHTD.
55 East Monroe Street
Suite 4005
Chicago, Illinois 60603
(Counsel for Sentry Food Stores, Inc.)

I further certify that all parties required to be served have been served.

WILLIAM A. CAREY
BARNETT & ALAGIA
1000 Thomas Jefferson Street, N.W.
Suite 600
Washington, D.C. 20007
(Counsel for Associated Reserve Standby Pool Cooperative)